Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-554

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES PROPERTIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 30, 1985
CERTIORARI GRANTED DECEMBER 2, 1985

81PM

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* The opinions and judgments of the court of appeals and of the district court are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

IN THE UNITED STATES CLAIMS COURT

No. 594-82T

HUGHES PROPERTIES, INC.

v.

THE UNITED STATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Nov 19 1982	Filing fee of $60 paid by plaintiff.
Nov 19 1982	Notice of assignment to Judge Robert M. M. Seto filed. Notice to parties.
Jan 14 1983	Defendant's motion for enlargement of time (to MAR 4 1983) to answer etc. the complaint filed. Service by mail: JAN 14 1983. ALLOWED:
Mar 1 1983	Defendant's answer filed. Service by mail: 3/1/83.
Mar 10 1983	Judge's standard pretrial order on liability (Rule 16) filed. Copy to parties. [Submission: May 10, 1983]
Jun 8 1983	Defendant's motion for enlargement of time (to July 8 1983) to respc to the pretrial order on liability filed. Service by mail: 6/8/83. ALLOWED: JUN 10 1983.
Jul 8 1983	Defendant's motion for extension of time (to July 29, 1983) to comply with pretrial order filed. Service by mail: 7/8/83. ALLOWED: AUG 9

DATE	PROCEEDINGS
Jul 29 1983	Defendant's motion for summary judgment filed. Service by mail: 7/29/83.
Jul 29 1983	Defendant's motion for suspension of pretrial proceedings (pending decision on motion for summary judgment) filed. Service by mail: 7/29/83. ALLOWED: SEP 20 1983.
Aug 29 1983	Plaintiff's cross-motion for summary judgment and opposition to defendant's motion for summary judgment filed. Service by mail: 8/26/83.
Sep 26 1983	Defendant's reply brief in support of its motion for summary judgment and in opposition to plaintiff's cross-motion for summary judgment for Service by mail: 9/26/83.
Oct 12 1983	Plaintiff's reply brief filed. Service by mail: 10/11/83.
Oct 28 1983	Judge's order scheduling oral arguments filed. Copy to parties.
Nov 23 1983	Order entered vacating order scheduling oral arguments filed October Copy to parties.
Feb 3 1984	Judge's order scheduling oral argument, and directing counsel to pre motions or additional matters by informing the court by February 10, 1984, filed. Copy to parties.
Feb 22 1984	Transcript of proceedings (1 volume) taken at Washington, D.C. on February 16, 1984 filed. Notice to parties.
Jun 29 1984	Judge's opinion dismissing defendant's motion for summary judgment and granting plaintiff's motion for summary judgment filed. Parties are to submit joint stipulation: JUL 30 1984. Upon receipt the Clerk shall enter judgment for plaintiff. Copy to parties.

DATE	PROCEEDINGS
Jul 30 1984	Stipulation of the parties filed by deft. Service by mail: 7/30/84.
Aug 1 1984	Judgment entered that plaintff recover the amounts as listed below, plus statutory interest:

Taxable Year Ending	Tax Refund Due
June 30, 1973	$172,909.70
June 30, 1974	97,802.61
June 30, 1975	139,008.11
June 30, 1977	23,721.46

Copy to parties.

Aug 1 1984	Certified transcript of judgment forwarded to attorney of record. See correspondence in file.
Sep 28 1984	Defendant's notice of appeal filed. Copy to plaintiff and C.A.F.C.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-503
594-82T

HUGHES PROPERTIES, INC., PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
		COUNSEL FOR THE APPELLANT: Mary L. Fahey
		COUNSEL FOR THE APPELLEE: Denton N. Thomas, O.C. Lilienstern 11/30
October 9, 1984	1.	Certificate of Interest filed by appellee. (bam)
November 28, 1984	2.	Motion of appellant to extend time for filing brief/appendix to and including Jan. 3, 1985, filed. (dm) (SD 11/27 M) GRANTED: November 30, 1984. (NO FURTHER EXTENSIONS SHOULD BE EXPECTED.) (ejc)
January 3, 1985		BRIEF/SEPARATE APPENDIX VOLS. I & II FOR APPELLANT, filed. (SD-1/3-M)
February 8, 1985		BRIEF FOR THE APPELLEE, filed. (SD-2/8-M) scg

DATE	PROCEEDINGS
February 26, 1985	REPLY BRIEF FOR APPELLANT, filed. (SD-2/25-M) scg
March 1, 1985	Letter to counsel re NEw Orleans argument on 3/28/85.
March 28, 1985	Argued (New Orleans). Bennett, Smith & Bissell, JJ
May 2, 1985	JUDGMENT AFFIRMED. OPINION BY BENNETT, CIRCUIT JUDGE
May 15, 1985	Appellee's Bill of Costs, filed ALLOWED: 6/19/85 for $88.00.
June 18, 1985	MANDATE ISSUED TO U.S. CLAIMS COURT. (dm)
September 30, 1985	PETITION FOR CERTIORARI FILED IN THE SUPREME COURT. (85-554)

IN THE UNITED STATES CLAIMS COURT

File No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT

(Filed November 19, 1982)

TO THE HONORABLE JUDGES OF THE UNITED STATES CLAIMS COURT:

Plaintiff, Hughes Properties, Inc. (formerly Hughes Television Network, Inc. and Sands, Inc.), files this complaint to recover from the United States of America overpayments of Federal income taxes and interest for the fiscal years ended June 30, 1973, 1974, 1975, and 1977, and for its cause of action states as follows:

1. This Court has jurisdiction over this action by virtue of Title 28, U.S.C. Sections 1346 and 1491. Plaintiff's cause of action arises under Title 26, U.S.C. (Internal Revenue Code of 1954, as amended) Section 446.

2. Plaintiff is a Nevada corporation with principal executive offices at 4045 South Spencer Street, Las Vegas, Nevada 89109.

3. (a) Plaintiff seeks to recover from defendant the amount of $239,470.00 or such greater amount as may be legally due, with interest thereon according to law, representing overpayments of Federal income taxes in the

amount of $172,909.00, and interest collected thereon in the amount of $66,561.00, erroneously assessed and collected by the Internal Revenue Service for the fiscal year ending June 30, 1973.

(b) Plaintiff seeks to recover from defendant the amount of $129,638.00 or such greater amount as may be legally due, with interest thereon according to law, representing overpayments of Federal income taxes in the amount of $97,844.00, and interest collected thereon in the amount of $31,794.00, erroneously assessed and collected by the Internal Revenue Service for the fiscal year ending June 30, 1974.

(c) Plaintiff seeks to recover from defendant the amount of $175,049.00 or such greater amount as may be legally due, with interest thereon according to law, representing overpayments of Federal income taxes in the amount of $139,008.00, and interest collected thereon in the amount of $36,041.00, erroneously assessed and collected by the Internal Revenue Service for the fiscal year ending June 30, 1975.

(d) Plaintiff seeks to recover from defendant the amount of $28,661.00 or such greater amount as may be legally due, with interest thereon according to law, representing overpayments of Federal income tax in the amount of $23,721.00, and interest collected thereon in the amount of $4,940.00, erroneously assessed and collected by the Internal Revenue Service for the fiscal year ending June 30, 1977.

4. The said overpayments result from an erroneous determination by the Internal Revenue Service that for the purpose of Federal income taxes Plaintiff could not deduct currently accrued progressive slot machine jackpot payoffs on the grounds that Plaintiff's liability is contingent until a jackpot is actually paid, and until such payment the amount of the liability cannot be determined with reasonable accuracy. In fact, all of the events have occurred which determine that the Plaintiff has incurred a liability, the liability of Plaintiff for jackpots on pro-

gressive slot machines is not contingent upon the occurrence of a future event—the actual winning of the guaranteed jackpot, the liability incurred is measurable in money with reasonable accuracy in the tax year in which it is accrued, and thus such amounts are deductible expenses in the year accrued.

5. (a) For the fiscal year ending June 30, 1973, Plaintiff (then Sands, Inc. and Subsidiaries, 88-0062602, 25th Floor, Exxon Building, Houston, Texas) filed its Federal income tax return on or about December 7, 1973, in Austin, Texas.

(b) For the fiscal year ending June 30, 1974, Plaintiff (then Sands, Inc. and Subsidiaries, 88-0062602, 25th Floor, Exxon Building, Houston, Texas) filed its Federal income tax return on or about March 13, 1975, in Austin, Texas.

(c) For the fiscal year ending June 30, 1975, Plaintiff (then Hughes Television Network, Inc. [formerly Sands, Inc.], 88-0062602, 25th Floor, Exxon Building, Houston, Texas) filed its Federal income tax return on or about March 15, 1976, in Austin, Texas.

(d) For the fiscal year ending June 30, 1977, Plaintiff (Hughes Properties, Inc., 88-0062602, P. O. Box 14000, Las Vegas, Nevada) filed its Federal income tax return on or about March 10, 1978, in Ogden, Utah.

6. (a) For the fiscal year ending June 30, 1973, Plaintiff paid to the Internal Revenue Service Federal income taxes in the amount of $1,557,095.00.

(b) For the fiscal year ending June 30, 1974, Plaintiff paid to the Internal Revenue Service Federal income taxes in the amount of $2,196,288.00.

(c) For the fiscal year ending June 30, 1975, Plaintiff paid to the Internal Revenue Service Federal income taxes in the amount of $1,530,621.00.

(d) For the fiscal year ending June 30, 1977, Plaintiff paid to the Internal Revenue Service Federal income taxes in the amount of $2,768,677.00.

7. (a) With respect to the payment of part of the taxes described in paragraph 6(a), the Internal Revenue Service assessed against Plaintiff Federal income tax in the amount of $172,909.00, plus interest thereon in the amount of $66,561.00, based on the determination by the Internal Revenue Service that Plaintiff could not deduct currently the guaranteed jackpot on progressive slot machines for the fiscal year ending June 30, 1973.

(b) With respect to the payment of part of the taxes described in paragraph 6(b), the Internal Revenue Service assessed against Plaintiff Federal income tax in the amount of $97,844.00, plus interest thereon in the amount of $31,794.00, based on the determination by the Internal Revenue Service that Plaintiff could not deduct currently the guaranteed jackpot on progressive slot machines for the fiscal year ending June 30, 1974.

(c) With respect to the payment of part of the taxes described in paragraph 6(c), the Internal Revenue Service assessed against Plaintiff Federal income tax in the amount of $139,008.00. plus interest thereon in the amount of $36,041.00, based on the determination by the Internal Revenue Service that Plaintiff could not deduct currently the guaranteed jackpot on progressive slot machines for the fiscal year ending June 30, 1975.

(d) With respect to the payment of part of the taxes described in paragraph 6(d), the Internal Revenue Service assessed against Plaintiff Federal income tax in the amount of $23,721.00, plus interest thereon in the amount of $4,940.00, based on the determination by the Internal Revenue Service that Plaintiff could not deduct currently the guaranteed jackpot on progressive slot machines for the fiscal year ending June 30, 1977.

8. (a) On June 29, 1979, Plaintiff paid to the Internal Revenue Service, Las Vegas, Nevada, the amount of $239,470.00 in satisfaction of the Federal income tax and interest assessments described in paragraph 7(a).

(b) On June 29, 1979, Plaintiff paid to the Internal Revenue Service, Las Vegas, Nevada, the amount of

$129,638.00 in satisfaction of the Federal income tax and interest assessments described in paragraph 7(b).

(c) On July 13, 1979, Plaintiff paid to the Internal Revenue Service, Las Vegas, Nevada, the amount of $175,049.00 in satisfaction of the Federal income tax and interest assessments described in paragraph 7(c).

(d) On December 10, 1980, Plaintiff paid to the Internal Revenue Service, Las Vegas, Nevada, the amount of $28,661.00 in satisfaction of the Federal income tax and interest assessments described in paragraph 7(d).

9. (a) On or about November 12, 1980, Plaintiff (Hughes Properties, Inc., 4045 South Spencer Street, Las Vegas, Nevada) timely filed with the Internal Revenue Service, Ogden, Utah, a formal claim for refund of $239,470.00, representing Federal income tax paid for the year ending June 30, 1973, in the amount of $172,909.00, and interest paid thereon in the amountof $66,561.00.

Such claim asserted that all of the events had occurred which determined that the Plaintiff had incurred a liability, such liability existed prior to the guaranteed jackpot payoff and was not contingent upon the occurrence of a future event, and the liability incurred was measurable in money with reasonable accuracy in the year in which it was accrued.

(b) On or about November 12, 1980, Plaintiff (Hughes Properties, Inc., 4045 South Spencer Street, Las Vegas, Nevada) timely filed with the Internal Revenue Service, Ogden, Utah, a formal claim for refund of $129,638.00, representing Federal income tax paid for the year ending June 30, 1974, in the amount of $97,844.00, and interest paid thereon in the amount of $31,794.00.

Such claim asserted that all of the events had occurred which determined that the Plaintiff had incurred a liability, such liability existed prior to the guaranteed jackpot payoff and was not contingent upon the occurrence of a future event, and the liability incurred was measurable in money with reasonable accuracy in the year in which it was accrued.

(c) On or about November 12, 1980, Plaintiff (Hughes Properties, Inc., 4045 South Spencer Street, Las Vegas, Nevada) timely filed with the Internal Revenue Service, Ogden, Utah, a formal claim for refund of $175,049.00, representing Federal income tax paid for the year ending June 30, 1975, in the amount of $139,008.00, and interest paid thereon in the amount of $36,041.00.

Such claim asserted that all of the events had occurred which determined that the Plaintiff had incurred a liability, such liability existed prior to the guaranteed jackpot payoff and was not contingent upon the occurrence of a future event, and the liability incurred was measurable in money with reasonable accuracy in the year in which it was accrued.

(d) On or about February 12, 1981, Plaintiff (Hughes Properties, Inc., P. O. Box 14000, Las Vegas, Nevada) timely filed with the Internal Revenue Service, Ogden, Utah, a formal claim for refund of $28,661.00, representing Federal income tax paid for the year ending June 30, 1977, in the amount of $23,721.00, and interest paid thereon in the amount of $4,940.00.

Such claim asserted that all of the events had occurred which determined that the Plaintiff had incurred a liability, such liability existed prior to the guaranteed jackpot payoff and was not contingent upon the occurrence of a future event, and the liability incurred was measurable in money with reasonable accuracy in the year in which it was accrued.

10. On or about April 30, 1981, an officer of Plaintiff, who was authorized to sign, executed and delivered to the Internal Revenue Service a Waiver of Statutory Notification of Claim Disallowance (Form 2297) waiving the requirement under section 6532(a)(1) of the Internal Revenue Code that a notice of claim disallowance be sent to Plaintiff by certified or registered mail for the claims for refund described in paragraphs 9(a), (b) and (c).

11. On or about November 4, 1981, an officer of Plaintiff, who was authorized to sign, executed and delivered

to the Internal Revenue Service a Waiver of Statutory Notification of Claim Disallowance (Form 2297) waiving the requirement under section 6532(a)(1) of the Internal Revenue Code that a notice of claim disallowance be sent to Plaintiff by certified or registered mail for the claim for refund described in paragraph 9(d).

12. No part of the amount herein claimed has ever been paid or credited to Plaintiff. No action on these claims other than that described herein has been taken by Congress or any department or agency of the United States or in any judicial proceeding.

13. Plaintiff is and always has been the sole owner of the claims for refund described herein; it has not assigned or transferred such claims or any part thereof or interest therein.

WHEREFORE, Plaintiff prays for judgment in the amount of $572,818.00, or such greater amount as Plaintiff may be entitled to recover, together with interest thereon according to law, and for such other and further relief, including costs, as to this Court may seem just and proper.

Respectfully submitted,

/s/ Denton N. Thomas
DENTON N. THOMAS
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200
Attorney for Plaintiff

Of Counsel:

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IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

ANSWER

[Filed Mar. 1, 1983]

Defendant, the United States, in answer to the complaint in the above-captioned case, respectfully denies each and every allegation contained therein not admitted, qualified, or expressly referred to below:

Defendant further:

1. Admits that this Court has jurisdiction over this action and avers that the provisions of the Internal Revenue Code of 1954, as amended, govern the controversy in question in this litigation.

2. Admits the allegations contained in paragraph 2.

3. Admits that plaintiff seeks to recover the amounts specified in paragraphs 3(a) through 3(d), but denies that any of the amounts referred to therein represented overpayments or were erroneously assessed against or collected from plaintiff.

4. Denies the allegations contained in paragraph 4, and specifically denies that the Internal Revenue Service's determination referred to in the first sentence therein was erroneous.

5. Admits that plaintiff's returns referred to in paragraphs 5(a) through 5(d) were timely filed.

6-7. Admits the allegations contained in paragraphs 6 and 7.

8. Admits the allegations contained in paragraphs 8 (a) and 8(b). States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 8(c) and 8(d).

9. Admits that the claims for refund referred to in paragraph 9 were timely filed. Further admits that the said claims contained the assertions referred to in the second full paragraph of each of the paragraphs numbered 9(a) through 9(d), inclusive, but denies that the "all events" test within the meaning of Treasury Regulations Section 1.461-1(a)(2) was satisfied with respect to plaintiff's claimed deduction in controversy in this litigation.

10. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10.

11. Admits the allegations contained in paragraph 11.

12-13. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12 and 13.

WHEREFORE, defendant requests that the complaint be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
Assistant Attorney General

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT

Defendant, the United States, pursuant to Rule 56 of the Rules of this Court, respectfully moves for summary judgment in its favor. There is no genuine issue as to any material fact, and the defendant is entitled to judgment as a matter of law.

In support of this motion, defendant relies on the Affidavit of David C. Hickman and the exhibit thereto,* and our accompanying brief.

WHEREFORE, defendant prays that its motion be granted.

Respectfully submitted,

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
Assistant Attorney General

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* The Affidavit of David C. Hickman and the exhibit thereto are contained in the separately bound Appendix to the brief in support of this motion.

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF DAVID C. HICKMAN

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

I, David C. Hickman, hereby affirm and attest that the following allegations are true to the best of my knowledge and belief:

1. I am the trial attorney assigned by the Department of Justice to the defense of this case.

2. That attached hereto is plaintiff's submission in response to the pretrial issued on February 24, 1983.

Further, affiant sayeth not.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29, 1983, in Washington, D.C.

/s/ David C. Hickman
DAVID C. HICKMAN

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

PLAINTIFF'S SUBMISSION IN RESPONSE TO PRETRIAL ORDER

For convenience of reference, the Plaintiff's submission in compliance with the Pretrial Order which was filed March 10, 1983, follows the format of such Order by citing the numbered paragraph pursuant to which each portion of a particular submission has been prepared.

1. *Plaintiff's submission.*

(a) Documents to be relied on and offered in evidence—

Plaintiff's Exhibit Number 1: Audited financial statements of Harolds Club, Inc. for fiscal year ending June 30, 1973

Plaintiff's Exhibit Number 2: Audited financial statements of Harolds Club, Inc. for fiscal year ending June 30, 1974

Plaintiff's Exhibit Number 3: Audited financial statements of Harolds Club, Inc. for fiscal years ending June 30, 1974 and June 30, 1975

Plaintiff's Exhibit Number 4: Audited financial statements of Harolds Club, Inc. for fiscal years ending June 30, 1976, and June 30, 1977

Plaintiff's Exhibit Number 5: Letter dated February 2, 1978, from Mr. A. J. Hicks, Deputy Attorney General, Chief, Gaming Division, State of Nevada, and attachments

Plaintiff's Exhibit Number 6: State of Nevada Gaming Commission Regulation 5.110 (as (adopted in September 1972)

Plaintiff's Exhibit Number 7: State of Nevada Gaming Commission Regulation 5 (as amended effective March 1, 1977)

Plaintiff's Exhibit Number 8: State of Nevada Gaming Commission Regulation 7

Plaintiff's Exhibit Number 9: Nevada Revised Statutes §§ 463.310, 463.312, and 463.315

Plaintiff's Exhibit Number 10: Letter dated August 20, 1976, from Mr. Jeffrey A. Silver, Member of the Gaming Control Board of the State of Nevada

Plaintiff's Exhibit Number 11: Schedule of guaranteed jackpot payouts on Harolds Club's 4-reel progressive slot machines from September 9, 1971 to September 1, 1976

Plaintiff's Exhibit Number 12: Schedule of Harolds Club's progressive slot machines' liabilities as of June 30, 1977, and subsequent guaranteed jackpot payouts

Plaintiff's Exhibit Number 13: A statement of the proposed direct testimony of each prospective expert witness who will be called by Plaintiff at the trial—

(A) Mr. Philip P. Hannifin (formerly Chairman of the Nevada Gaming Control Board):

The amount of the accrued but unpaid progressive slot machine jackpot liability can be determined by reading the payoff indicator on the machine. The payoff indicator states the exact amount of the accrued but unpaid progressive slot machine jackpot for that machine at that particular point in time. Thus the amount of the accrued liability can be determined with reasonable accuracy. The winning pull of the handle of the progressive slot machine determines solely the time of the payment of liability and the identity of the payee.

The Nevada Gaming Regulations are binding upon all licensed gaming establishments in the State of Nevada. On July 1, 1972, there were no regulations pertaining to progressive slot machines. At that time, the amount for each machine was not a fixed liability because the Plaintiff could avoid the liability by removing the machine from the casino floor. Upon the adoption of Gaming Regulation § 5.110 in September of 1972, the liability became fixed. Regulation § 5.110 precludes a licensed gaming establishment from avoiding payment of accrued but unpaid progressive slot machine jackpots. Harolds Club is a licensed gaming establishment subject to the Nevada Gaming Regulations.

(B) Mr. John H. Stratton (formerly a Member of the Nevada Gaming Control Board):

If a licensed gaming establishment proposes to discontinue the use of a progres-

sive slot machine, the policy of the Nevada Gaming Control Board is, and during the taxable years at issue was, to require the gaming establishment to either (a) continue the progressive slot machine in play until the progressive jackpot has been paid to a winning customer or (b) transfer the progressive jackpot amount to another progressive slot machine remaining in play at the licensed gaming establishment.

If a licensed gaming establishment proposes a sale or other disposition of the entire gaming business, the policy of the Nevada Gaming Control Board is, and during the taxable years at issue was, to require the buyer to continue the progressive slot machines in play following the sale or other disposition with the same or greater progressive jackpot amounts as at the time of the sale until the jackpots are won by customers of the buyer. Whether or not the sales price for the gaming business is to be adjusted to reflect the assumption of the progressive slot machine liabilities is to be a subject of contractual negotiations between the buyer and seller. The policy of the Nevada Gaming Control Board is, and as of June 30, 1973-1977, was, to not approve the sale or other disposition unless adequate provision was made for the payment of the progressive slot machine liabilities prior to the sale or the assumption of the liabilities by the buyer following the sale.

(C) Mr. Peter Echeverria (formerly a Member and Chairman of the Nevada Gaming Commission):

If a licensed gaming establishment proposed to discontinue the use of a progres-

sive slot machine, the policy of the Nevada Gaming Commission during the taxable years at issue was to require the gaming establishment to either (a) continue the progressive slot machine in play until the progressive jackpot had been paid to a winning customer or (b) transfer the progressive jackpot amount to another progressive slot machine remaining in play at the licensed gaming establishment.

If a licensed gaming establishment proposed a sale or other disposition of the entire gaming business, the policy of the Nevada Gaming Commission during the taxable years at issue was to require the buyer to continue the progressive slot machines in play following the sale or other disposition with the same or greater progressive jackpot amounts as at the time of the sale until the jackpots were won by customers of the buyer. Whether or not the sales price for the gaming business was to be adjusted to reflect the assumption of the progressive slot machine liabilities was a subject of contractual negotiations between the buyer and seller. The policy of the Nevada Gaming Commission was to not approve the sale or other disposition unless adequate provision was made for the payment of the progressive slot machine liabilities prior to the sale or the assumption of the liabilities by the buyer following the sale.

(D) Mr. Jeffrey A. Silver (formerly a Member of the Nevada Gaming Control Board):

The provisions of Nevada Gaming Commission Regulation § 5.110 have been applied by the Nevada Gaming Control Board as making guaranteed jackpots fixed liabilities of the licensee. Two instances of the Board's application of this fixed liability concept are as follows:

(1) A licensee requested permission to remove a progressive slot machine from operation and replace it with a regular slot machine. The Board granted approval upon the condition that the guaranteed jackpot of the removed progressive slot machine be added to the guaranteed jackpot amount of another progressive slot machine.

(2) A licensee who initially operated as a sole proprietorship but who had subsequently acquired a partner requested permission to remove all progressive slot machines from its casino floor. Even though a new individual had become a licensee and the form of casino ownership had changed to a partnership, the Board denied permission since the guaranteed progressive jackpots had not been paid.

Once a progressive slot machine is placed in operation, the liability for its guaranteed jackpot cannot be avoided by removing the machine, changing the form of the licensee's business operations or by a change of licensees. Sums shown on the meter, in contrast to standard slot machines, actually represent participation by the players, a portion of their play being used to increase the award. The Board in recognizing this investment requires the licensee to be responsible for the obligation shown on

the meter and holds it accountable until the amount is actually paid.

(E) Mr. A. J. Hicks (Formerly Deputy Attorney General, Chief, Nevada Gaming Division)

Pursuant to § 463.310 of the Nevada Revised Statutes, as in effect during the taxable years in issue, administrative remedies could be imposed against any licensed gaming establishment which wrongfully refused to pay a progressive slot machine jackpot which had been won by a customer. The administrative remedies included fines and/or the revocation or suspension of the gaming license.

(F) Mr. Philip D. Griffith:

The total amount of accrued but unpaid progressive slot machine jackpots of Plaintiff at the close of business was as follows:

Fiscal Year Ended June 30	Accrued Liability	Expense (Income)
1973	$360,228.55	$360,228.55
1974	563,983.99	203,755.44
1975	853,584.22	289,600.23
1976	839,400.97	(14,183.25)
1977	888,820.67	49,419.70

In the case of Plaintiff, the payment of the accrued progressive slot machine jackpots cannot be avoided so long as the Plaintiff remains in the gaming business. Under Nevada law, if the Plaintiff were to surrender its gaming license, it would no longer be subject to the gaming laws and regulations and could thus avoid the payment of the liability. However, considering the magnitude of the investment in Harolds Club and the success and financial condition of the Plaintiff as of the end of the taxable years at issue and as of the present time, the possibility of the Plaintiff discontinuing its

gaming operations certainly is extremely remote. The only other circumstance under which the Plaintiff could avoid the payment of the liability would be if the Plaintiff became bankrupt. Once again, however, considering the financial condition of the Plaintiff at the end of the taxable years at issue, such a possibility certainly was extremely remote and speculative.

The facts indicate that all of the accrued but unpaid progressive slot machine jackpots as of June 30, 1977, were subsequently won by and paid to customers of the Plaintiff. The average period of time between Harolds Club's payoffs on a progressive slot machine's guaranteed jackpot is approximately 4.5 months. This determination was made as of September 1, 1976, of the twenty-four (24) 4-reel progressive slot machines then in operation. All but two of these machines were installed prior to 1974. With the exception of two machines, one of which had been in operation thirteen (13) months and the other thirty-five (35) months, that did not pay off prior to September 1, 1976, the payoff frequency ranged from a high of 14.3 months to a low of 1.9 months. As of September 1, 1976, Harolds Club also operated ninety-two (92) 3-reel progressive slot machines. The average number of "plays" required for a payoff on these machines is significantly lower than that of the 4-reel machines. Thus their payoff is much faster than that of the 4-reel machines. Accordingly, the volume of play on the progressive slot machines of Plaintiff, the odds of a customer winning the jackpot, and the fact that all of the accrued progressive jackpots of Plaintiff as of June 30, 1977, have been paid establish that there does

exist a reasonable expectancy of payment of the accrued progressive slot machine jackpots.

(G) Mr. Gene Harris:

In the case of progressive slot machines, the amount of the liability for accrued but unpaid jackpots increases in direct proportion to the number of coins played in the machine. The accrued progressive slot machine liability of Plaintiff is incurred in the year in which the related income is earned from the play on the machine. The reporting of accrued but unpaid progressive slot machine jackpots as accrued liabilities and any increases in the accrued liabilities as a reduction of the slot machine gross profit of the licensed gaming establishment conforms with generally accepted accounting principles, results in a proper matching of revenues and expenses and clearly reflects income. Since all subsequent increases in the amount of the jackpot must result from play on the machines and the corresponding recognition of taxable income by the casino, there would be no distortion of income resulting from the deduction of the subsequent accrual. To require the deduction to be deferred until the year of actual payment, rather than the year in which the liability accrues, could result in a material distortion of the Plaintiff's taxable income for the year of payment. The amount of the related expenses is minimal compared to the amount of income recognized.

(b) Plaintiff hereby alleges the following facts, all of which are material, and none of which is genuinely in issue.

(1) Plaintiff, Hughes Properties, Inc. (formerly Hughes Television Network, Inc. and

Sands, Inc.) is a Nevada corporation which operates a gambling casino in Nevada under the name of Harolds Club. The issue in dispute in this case concerns the taxable income of Plaintiff for the Plaintiff's taxable years ending June 30, 1973, 1974, 1975 and 1977.

(2) Plaintiff filed its Federal income tax returns for the taxable years ending June 30, 1973, 1974, 1975 and 1977 in a timely manner. The Federal income taxes for such taxable years were paid by Plaintiff in a timely manner. Plaintiff claimed a deduction on its Federal income tax returns for the taxable years ending June 30, 1973, 1974, 1975 and 1977 for the liability of Plaintiff for progressive jackpot amounts which were accrued but unpaid as of June 30, 1973, 1974, 1975 and 1977.

(3) The consistency of Plaintiff's application of accrual principles is evidenced by Plaintiff's recognition of taxable income on its Federal income tax return for the taxable year ending June 30, 1976. The total amount of the liability of Plaintiff for progressive jackpot amounts which were accrued but unpaid decreased from June 30, 1975 to June 30, 1976, resulting in the recognition of such taxable inccome.

(4) The Internal Revenue Service disallowed Plaintiff's deductions claimed for the accrued progressive slot machine liability of Plaintiff for its taxable years ending June 30, 1973, 1974, 1975 and 1977. The Internal Revenue Service assessed against Plaintiff Federal income tax plus interest, based on the determination by the Internal Revenue Service that Plaintiff could not deduct currently the guaranteed jackpot on progressive slot machines for the fiscal years ending June 30, 1973, 1974, 1975

and 1977. Plaintiff paid to the Internal Revenue Service the Federal income tax and interest assessments. Plaintiff timely filed with the Internal Revenue Service formal claims for refund of such Federal income taxes and interest assessed by the Internal Revenue Service and paid by the Plaintiff. An officer of Plaintiff, who was authorized to sign, executed and delivered to the Internal Revenue Service Waivers of Statutory Notification of Claim Disallowance (Forms 2297) waiving the requirement under Section 6532(a)(1) of the Internal Federal Revenue Code of 1954 as amended (the "Code"), that a notice of claim disallowance be sent to Plaintiff by certified or registered mail for the claims for refund.

(5) At all times relevant to this action, Plaintiff has been licensed by the State of Nevada to engage in the business of gaming. As a licensed gaming establishment, Plaintiff has been subject to all of the statutes, regulations and policies enacted by the State of Nevada, the Nevada Gaming Commission, and the Nevada Gaming Control Board for the regulation of gaming establishments.

(6) During its fiscal years ending June 30, 1973, 1974, 1975 and 1977, Plaintiff owned and operated, on its casino floor, progressive slot machines. A progressive slot machine operates in the same manner as a non-progressive slot machine, except that the progressive jackpot amounts indicated on a progressive slot machine increase in direct relation to the amount of money put into the machine by customers. A non-progressive slot machine pays jackpots of fixed amounts when the designated combinations of symbols appear on the face of the slot machine. A progressive slot machine

also pays fixed amount jackpots when designated combinations of symbols appear; however, a progressive slot machine also pays progressive jackpots which increase in amount from the initial setting of the progressive jackpot indicator in direct proportion to the amount of money put into the machine by customers, and continue to increase until the progressive jackpot is won by a customer, or until the maximum progressive jackpot amount, if any, is reached. The amount registered on the meter for a progressive slot machine is referred to as the "guaranteed jackpot."

During the taxable years at issue, Plaintiff owned various types of progressive slot machines. Plaintiff operated progressive slot machines having nickel, dime, quarter, half dollar and dollar denominations. Some progressive slot machines are single coin machines; that is, only one coin may be played for each handle pull. All other progressive slot machines are multiple coin machines which accept one to five coins for each handle pull. On some of the multiple coin progressive slot machines, a customer will only have a chance at the progressive jackpot amount if he plays the maximum number of coins acceptable by the machine. In addition, some progressive slot machines indicate two progressive jackpot amounts and are referred to in the gaming industry as double progressive slot machines. On some double progressive slot machines, the availability of one progressive jackpot amount versus the other progressive jackpot amount depends upon the number of coins put into the machine by the customer, whereas on others the availability of one progressive jackpot versus the other alternates with each handle pull by a customer.

On the double progressive slot machines, only one progressive jackpot may be won at any one time; however, the second jackpot must remain available to be won by the customers after the first jackpot is paid.

(7) A progressive jackpot is won when the required combination of symbols appears on the face of the machine, and, in the case of multiple coin progressive slot machines, when the required number of coins has been put in the machine by the customer. The odds of winning a progressive jackpot are determined by the number of reels, the number of positions on each reel where the reel may stop, and the number of winning symbols which are placed on each reel. The amount of the progressive jackpot is indicated on the face of the machine by a meter which automatically increases in amount as coins are placed in the machine.

(8) Prior to September 1972, the Nevada Gaming Commission had no regulations governing the use of progressive slot machines. In September 1972, the Nevada Gaming Commission adopted Regulation § 5.110, regulating the use of progressive slot machines by licensed gaming establishments. Subsection 5 of Nevada Gaming Regulation § 5.110, as in effect during the taxable years at issue, requires licensed gaming establishments to maintain records which record the amount of the indicated payoff (meter reading) at least once per day. In addition, subsection 5 requires the gaming establishment to maintain supporting documents explaining any reduction in the payoff amount from a previous entry.

In accordance with this regulation, Plaintiff, during the taxable years at issue, maintained daily records of the amounts shown on each progressive jackpot meter. Employees of Plain-

tiff, in the ordinary course of their employment, recorded the amounts shown on each progressive jackpot meter on daily progressive slot machine report sheets.

The daily progressive slot machine report sheets during the taxable years ending June 30, 1973, 1974, 1975, 1976 and 1977, reflect that the total of the accrued but unpaid progressive slot machine jackpots has not decreased except for any decreases to reflect jackpots actually paid. The total amount of accrued but unpaid progressive slot machine jackpots of Plaintiff at the close of business on June 30, 1973, 1974, 1975, 1976 and 1977 was as follows:

Fiscal Year Ended June 30	Accrued Liability	Expense (Income)
1973	$360,228.55	$360,228.55
1974	563,983.99	203,755.44
1975	853,584.22	289,600.23
1976	839,400.97	(14,183.25)
1977	888,820.67	49,419.70

The expense amounts indicated for taxable years ended June 30, 1973, 1974, 1975 and 1977 [are the amounts] Plaintiff claim[ed] as a deduction on its Federal income tax returns for such taxable years and are the amounts which Plaintiff claims entitle it to a refund of Federal income taxes. The amounts include the accrued but unpaid progressive slot machine jackpots indicated on both jackpot meters of the double progressive slot machines which were in play on June 30, 1973, 1974, 1975 and 1977.

(9) During the taxable years of Plaintiff ending June 30, 1973, 1974, 1975 and 1977, Plaintiff maintained its books and records and reported for Federal income tax purposes on the accrual method of accounting, except for casino receivables, bad debts, vacation pay and

property taxes which were reported on a cash basis.

(10) As long as the licensed gaming establishment remains subject to the jurisdiction of the Nevada Gaming Commission, the licensed gaming establishment cannot avoid the ultimate payment of the accrued progressive slot machine jackpot.

(11) Pursuant to § 463.310.4 of the Nevada Revised Statutes, administrative penalties may be imposed against any licensed gaming establishment which wrongfully refuses to pay a progressive slot machine jackpot which has been won by a customer. Section 463.310.4 of the Nevada Revised Statutes, effective during the taxable years at issue, stated the following penalties for failure to pay a progressive jackpot won by a customer:

> 4. After the provisions of subsections 1, 2 and 3 above have been complied with, the commission shall have full and absolute power and authority to:
>
> (a) Limit, condition, suspend or revoke the license of any licensed gaming establishment or the individual license of any licensee without affecting the license of the establishment;
>
> (b) Order a licensed gaming establishment to keep an individual licensee from the premises of such licensed gaming establishment or not to pay such licensee any remuneration for services or any profits, income or accruals on his investment in such licensed gaming establishment; and
>
> (c) Fine a licensed gaming establishment in an amount not to exceed

> $100,000.00 for the first violation by such establishment, or any individual licensee in an amount not to exceed $50,000.00 for the first violation by such individual, for any cause deemed reasonable by the commission. All fines shall be paid to the state treasurer for deposit in the general fund in the state treasury.

(12) During the taxable year of Plaintiff ending June 30, 1973, the Nevada Gaming Commission adopted Regulation § 5.110 regulating the use of progressive slot machines by licensed gaming establishments. Regulation § 5.110, adopted in September 1972, reads as follows:

> 1. This paragraph shall apply to any slot machine with a payoff indicator which has a payoff that increases as the machine is played.
>
> 2. No payoff indicator shall be turned back to a lesser amount, unless the amount by which the indicator has been turned back is actually paid to a winning player, or unless the change in the indicator reading is necessitated through a machine malfunction, in which case an explanation must be entered on the daily report as required in subsection 5.
>
> 3. If the payoff indicator progresses without a payoff until the indicators return to zero, some means must be utilized to add another digit, unless a dollar limit has been posted on the machine clearly visible to the player, and which was posted before any payoff was registered on the indicator. When the limit has been reached

> it must be permitted to remain until won by a player.
>
> 4. Once a payoff amount appears on an indicator, the rate of progression may not be changed until there has been a winner, and the indicator is returned to zero.
>
> 5. Records shall be maintained which record the amount of the indicated payoff at least once per day. Supporting documents shall be maintained to explain any reduction in the payoff amount from the previous entry. Such records and documents shall be retained for a period of three years unless permission to destroy them earlier is given by the board in writing.

This regulation was subsequently amended, effective March 1, 1977. As amended, Regulation § 5.110 reads as follows:

> 1. Applicability. This regulation shall apply to any slot machine with a payoff indicator which has a payoff that increases as the machine is played.
>
> 2. Limits. A licensee may impose a limit on the jackpot of a progressive slot machine so long as the limit imposed is greater than the possible maximum jackpot payout showing on the machine at the time the limit is imposed. Progressive slot machines upon which a limit has been imposed by the licensee must have a sign posted predominately [*sic*] upon it informing the public of the limit imposed.
>
> 3. Cash requirements. Licensees who operate under a restricted license or who are classified as a Group II nonrestricted licensee must maintain a minimum cash

reserve equal to the total of all progressive slot machine jackpots which may be won at the location. Nonrestricted Group I gaming licensees shall at all times maintain sufficient cash or cash equivalents to provide payment of all progressive jackpots offered to the public as prizes.

4. Payoff indicators. No payoff indicator shall be turned back to a lesser amount unless one of the following circumstances occur:

(a) The amount shown on the progressive meter is paid to a player as a jackpot; or

(b) It becomes necessary to adjust the progressive meter to prevent the jackpot indicator from displaying an amount greater than the limit imposed by the licensee pursuant to paragraph 2 of this regulation; or

(c) It becomes necessary to change the jackpot indicator because of machine malfunction, in which case an explanation must be entered on the daily report as required by paragraph 6 of this regulation.

5. Payoff required. Once a payoff amount apppears on a jackpot indicator, the progressive meter may not be decreased except as allowed by this regulation. A progressive jackpot may be transferred to another progressive machine at the same location in the event of machine malfunction, replacement, or for other good reasons. When the maximum jackpot limit is reached, it must be permitted to remain until won by a player.

6. Records. Records shall be maintained which record the amount shown on each progressive jackpot meter at least one time daily. Supporting documents shall be maintained to explain any reduction in the payoff amount from the previous entry. Such records and documents shall be retained for a period of five years unless permission to destroy them earlier is given by the board in writing.

7. Effective date. This regulation shall become effective on March 1, 1977, and shall apply to all licensees affected who are then or thereafter licensed.

(13) During the taxable years ending June 30, 1973, 1974, 1975, 1976 and 1977, the Nevada Gaming Commission had no restrictions on the transferability of the accrued but unpaid progressive slot machine liability on one progressive slot machine to another slot machine.

(14) The deduction of the accrued but unpaid progressive slot machine jackpot liability of Plaintiff as of June 30, 1973, 1974, 1975 and 1977, as an expense in arriving at taxable income would not distort the taxable income of Plaintiff.

(15) For the taxable years ending June 30, 1973, 1974, 1975 and 1977, the gross operating income of Harolds Club from its gaming transactions, after deducting all amounts won by customers in gaming transactions, but prior to the deduction of the accrued progressive slot machine liability, and the net income of Harold's Club from all of its activities, after deducting all expenses except the accrued pro-

gressive slot machine jackpot liability, were as follows:

Taxable Years Ending June 30	Gross Income From Gaming	Net Income From All Activities
1973	$20,367,609	$4,836,429
1974	20,859,135	5,512,863
1975	21,133,604	4,616,157
1976	23,299,066	6,901,156
1977	23,571,332	5,896,078

(c) A memorandum of contentions of fact and law is attached hereto.

(d) (1) A list setting forth the name, address and occupation of each of the prospective witnesses whom the Plaintiff proposes to call, and a succinct statement of the issue or issues to which the testimony of each witness will relate follows:

A. (1) Name:

Mr. A. J. Hicks

(2) Occupation:

Attorney (Formerly Deputy Attorney General Chief, Gaming Division, State of Nevada)

(3) Address:

McDonald, Carano, Wilson, Bergin,
Frankovich & Hicks
241 Ridge Street
Reno, Nevada 89505

(4) Issue:

A customer of a licensed gaming establishment has administrative remedies available to force a licensed gaming establishment to pay a gaming debt.

B. (1) Name:

Mr. Jeffrey A. Silver

(2) Occupation:

Chief Operations Officer, Landmark Hotel and Casino (Formerly a Member of the Gaming Control Board of the State of Nevada)

(3) Address:

Landmark Hotel and Casino
364 Convention Center Drive
Las Vegas, Nevada 89109

(4) Issue:

The payment of accrued but unpaid progressive slot machine jackpots are fixed, rather than contingent, liabilities because Nevada Gaming Regulation § 5.110 precludes the licensed gaming establishment from avoiding payment of the jackpot.

C. (1) Name:

Mr. John. H. Stratton

(2) Occupation:

Retired (Formerly a Member of the Gaming Control Board of the State of Nevada)

(3) Address:

1415 Mountain Street
Carson City, Nevada 89701

(4) Issue:

The payment of accrued but unpaid progressive slot machine jackpots are fixed, rather than contingent, liabilities because the policy of the Nevada Gaming Control Board is, and during taxable years at issue was, that upon any sale or other disposition of the entire gaming estab-

lishment, the accrued but unpaid progressive slot machine jackpots must either be paid to customers prior to the sale or assumed by the buyer following the sale.

D. (1) Name:

Mr. Peter Echeverria

(2) Occupation:

Attorney (Formerly a Member and Chairman of the Gaming Commission of the State of Nevada)

(3) Address:

Echeverria and Osborne
555 South Center Street
Reno, Nevada 89501

(4) Issue:

During the taxable years in issue, the payment of the accrued but unpaid progressive slot machine jackpot liability could not be avoided by the sale of the gaming business prior to the time that customers won the jackpots because pursuant to the policies of the Nevada Gaming Commission, the liability must have either been paid prior to the sale or assumed by the buyer.

E. (1) Name:

Mr. Philip P. Hannifin

(2) Occupation:

Senior Vice President, Summa Corporation (Formerly Chairman of the Gaming Control Board of the State of Nevada)

(3) Address:

Summa Corporation
4045 South Spencer Street
Las Vegas, Nevada 89109

(4) Issue:

(a) The payment of the liability for accrued but unpaid progressive slot machine jackpots is not subject to a contingency because Nevada Gaming Regulation § 5.110 precludes the licensed gaming establishment from avoiding payment of the jackpots.

(b) The accrued but unpaid progressive slot machine jackpots are fixed rather than contingent liabilities and the winning pull of the handle of the progressive slot machine determines solely the time of the payment of the liability and the identity of the payee.

(c) The amount of the liability for accrued but unpaid progressive slot machine jackpots can be determined with complete accuracy because the amount of the liability can be determined by reading the payoff indicator on the machine, which states the exact amount of the jackpot for that machine at that particular time.

(d) Upon the adoption of Gaming Regulation § 5.110 by the Nevada Gaming Commission in September of 1972, the amount accrued for each progressive slot machine became a fixed liability because the Plaintiff could not avoid the liability by removing the machine from the casino floor.

F. (1) Name:

Mr. Philip D. Griffith

(2) Occupation:

President, Harolds Club

(3) Address:

250 North Virginia Street
Reno, Nevada 89501

(4) Issues:

(a) Considering the magnitude of the Plaintiff's investment in Harolds Club, and the success and financial condition of the Plaintiff as of the end of the taxable years at issue and as of the present time, the possibility of the Plaintiff avoiding the payment of the accrued but unpaid progressive slot machine jackpots by surrendering its gaming license and discontinuing its gaming operations is extremely remote and speculative.

(b) Considering the financial condition of the Plaintiff at the end of the taxable years at issue, the possibility of the Plaintiff avoiding payment of the liability by becoming bankrupt was also extremely remote.

G. (1) Name:

Mr. Gene Harris

(2) Occupation:

Certified Public Accountant

(3) Address:

Deloitte, Haskins & Sells
1200 Travis
Houston, Texas 77002

(4) Issue:

The reporting of unpaid progressive slot machine jackpots as accrued liabilities results in a proper matching of revenues and expenses, and this accounting method conforms with generally accepted accounting principles.

(2) The preferred date for the beginning of the trial is November 15, 1983, and the preferred place therefor is Los Angeles, California.

(3) The approximate time that will be required for the direct examination of the Plaintiff's witnesses is four (4) days.

Respectfully submitted,

/s/ Denton N. Thomas
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ANDREWS & KURTH
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Houston, Texas 77002
(713) 220-4200
Attorney for Plaintiff

Of Counsel:

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PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Contentions of Fact

1. The Nevada Gaming Regulations are binding upon all licensed gaming establishments in the State of Nevada. (Philip P. Hannifin.)

2. On July 1, 1972, there were no regulations pertaining to progressive slot machines. At that point in time, the amount accrued for each machine was not a fixed liability because the Plaintiff could avoid the liability by removing the machine from the casino floor. Upon the adoption of Gaming Regulation § 5.110 in September of 1972, the liability became fixed. (Philip P. Hannifin; State of Nevada Gaming Commission Regulation 5, as adopted in September 1972.)

3. Once the increased jackpot amount is displayed on the progressive slot machine, the increased jackpot amount becomes a fixed liability which cannot be avoided. Nevada Gaming Regulation § 5.110 precludes the licensed gaming establishment from avoiding payment of the accrued but unpaid progressive slot machine jackpot. Under that Regulation, the amount of the accrued but unpaid progressive slot machine jackpot may be transferred to another progressive slot machine on the casino floor; however, the amount of the liability may not be reduced until the jackpot is paid, and the machine may not be removed from the floor (except for brief repairs) without either paying the accrued jackpot or transferring the accrued jackpot to one or more of the progressive slot machines which remain on the casino floor. (Jeffrey A. Silver; State of Nevada Gaming Commission Regulation 5, as adopted in September, 1972; State of Nevada Gaming Commission Regulation 5, as amended effective March 1, 1977; Letter dated August 20, 1976 from Mr. Jeffrey A. Silver.)

4. A customer of a licensed gaming establishment has administrative remedies available to force the licensed gaming establishment to pay a gaming debt. If a licensed gaming establishment refuses to pay a gaming debt, including a progressive slot machine jackpot, to a customer who has properly won the game, prize, or jackpot, the Nevada Gaming Commission may impose sanctions, including fines and/or the suspension or revocation of the gaming license. (A.J. Hicks; Nevada Revised Statutes §§ 463.310, 463.312 and 463.315; Letter dated February 2, 1978 from Mr. A. J. Hicks.)

5. If a licensed gaming establishment proposed to discontinue the use of a progressive slot machine, the policy of the Nevada Gaming Control Board and Nevada Gaming Commission during the taxable years at issue was to require the gaming establishment to either (a) continue the progressive slot machine in play until the progressive jackpot had been paid to a winning customer or (b) transfer the progressive jackpot amount to another progressive slot machine remaining in play at the licensed gaming establishment. (John H. Stratton and Peter Echeverria.)

6. If a licensed gaming establishment proposed a sale or other disposition of the entire gaming business, the policy of the Nevada Gaming Control Board and Nevada Gaming Commission during the taxable years at issue was to require the buyer to continue the progressive slot machines in play following the sale or other disposition with the same or greater progressive jackpot amounts as at the time of the sale until the jackpots were won by customers of the buyer. Whether or not the sales price for the gaming business was adjusted to reflect the assumption of the progressive slot machine liabilities was a subject of contractual negotiations between the buyer and seller. The policy of the Nevada Gaming Control Board and Nevada Gaming Commission as of June 30, 1973 through June 30, 1977, was to not approve the sale or other disposition unless adequate provision was made for the payment of the progressive slot machine liabilities prior to the sale or the assumption of the liabilities by

the buyer following the sale. (John H. Stratton and Peter Echeverria.)

7. Because of the severity of the sanctions which are available to the Nevada Gaming Commission if a licensed gaming establishment wrongfully refuses to pay a progressive slot machine jackpot which is won by a customer, there exists a means of enforcement which is as severe as and the equivalent of legal enforceability. With respect to a gaming debt owed by a licensed gaming establishment to a customer, administrative remedies are available to the customer. However, with respect to a gaming debt owed by a customer to a licensed gaming establishment, there are neither administrative nor legal remedies available to the licensed gaming establishment. (A. J. Hicks, Nevada Revised Statutes §§ 463.310, 463.312 and 463.315; Letter dated February 2, 1978 from Mr. A. J. Hicks.)

8. The payment of any portion of the accrued progressive slot machine jackpots cannot be avoided at least as long the the Plaintiff remains in the gaming business. Only the payment of the accrued jackpot, the bankruptcy of the Plaintiff, or the surrender of its gaming license could relieve it of its obligation. If the Plaintiff were to surrender its gaming license, it would no longer be subject to the gaming laws and regulations and could thus avoid the payment of the liability. However, considering the magnitude of the Plaintiff's investment in Harolds Club, and the success and financial condition of the Plaintiff as of the end of the taxable years at issue and as of the present time, the possibility of the Plaintiff discontinuing its gaming operations certainly is extremely remote and speculative. The only other circumstance under which the Plaintiff could avoid the payment of the liability would be if the Plaintiff became bankrupt. Once again, however, considering the financial condition of the Plaintiff at the end of the taxable years at issue, such a possibility certainly was extremely remote. (Philip D. Griffith;

Audited financial statements of Plaintiff for fiscal years ending June 30, 1973, 1974, 1975, 1976 and 1977.)

9. The winning pull of the handle of the progressive slot machine determines solely the time of the payment of the liability and the identity of the payee. (Phillip P. Hannifin.)

10. The amount of the accrued but unpaid progressive slot machine jackpot liability can be determined by reading the payoff indicator on the machine. The payoff indicator states the exact amount of the accrued but unpaid progressive slot machine jackpot for that machine at that point in time. The amount of the accrued liability can be determined with reasonable accuracy. (Philip P. Hannifin.)

11. The volume of play on the progressive slot machines of Plaintiff, the odds of a customer winning the progressive jackpot, and the fact that all of the accrued progressive jackpots of Plaintiff as of June 30, 1977, have been paid establish that there does exist a reasonable expectancy of payment of all of the accrued progressive slot machine jackpots which were on the casino floor. (Philip D. Griffith; Schedule of guaranteed jackpot payouts on Harolds Club's 4-reel progressive slot machines from September 9, 1971 to September 1, 1976; Schedule of Harolds Club's progressive slot machines liabilities as of June 30, 1977, and subsequent guaranteed jackpot payments).

12. The reporting of accrued but unpaid progressive slot machine jackpots as accrued liabilities and any increases in the accrued liabilities as a reduction of the slot machine gross profit of the licensed gaming establishment conforms with generally accepted accounting principles, results in a proper matching of revenues and expenses, and clearly reflects income. Since all subsequent increases in the amount of the jackpot must result from play on the machine and the corresponding recognition of taxable income by the casino, there could be no distortion of income resulting from the deduction of the

subsequent accrual. To require the deduction to be deferred until the year of actual payment rather than the year in which the liability accrues could result in a material distortion of taxable income for the year of payment. (Gene Harris; Audited financial statements of Plaintiff for the fiscal years ending June 30, 1973, 1974, 1975, 1976 and 1977.)

13. The accrued progressive slot machine liability of Plaintiff is incurred in the year in which the related income is earned. The accrual of the liability results in a proper matching of revenues and expenses. (Gene Harris; Audited financial statements of Plaintiff for the fiscal years ending June 30, 1973, 1974, 1975, 1976 and 1977.)

Contentions of Law

1. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C., Section 1346(a)(1).

2. Section 162 of the Internal Revenue Code of 1954, as amended (the "Code"), permits the deduction of all ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.

3. The amounts payable by Plaintiff to its gaming customers as a result of gaming transactions, including progressive slot machine jackpots, fall within the definition of ordinary and necessary expenses incurred in carrying on its gaming business and are deductible under Code Section 162.

4. The accrued but unpaid liability for progressive slot machine jackpots constitutes an "ordinary and necessary business expense," the deductibility of which is determined under Sections 162 and 461 of the Code.

5. There is a liability created for purposes of Reg. § 1.461-1(a)(2) at the point at which there is an obligation or duty to perform an act and the cost of performance is measurable in money.

Crescent Wharf and Warehouse Co. v. Commissioner, 518 F.2d 772, 75-2 USTC ¶ 9571 (9th Cir. 1975)

6. An accrued but unpaid progressive slot machine jackpot liability satisfies the requirements of Code Section 461 and Reg. § 1.461-1(a)(2) for the deduction of accrued liabilities by an accrual basis taxpayer.

7. In the case of progressive slot machine jackpots, the amount of the accrued but unpaid liability can be determined in money with reasonable accuracy in the year in which it is accrued in accordance with Reg. § 1.461-1(a)(2).

8. All the events have occurred which determine the fact that the Plaintiff has incurred a liability under Reg. § 1.461-1(a)(2).

9. The accrued but unpaid progressive slot machine jackpots are allowable deductions because in the taxable years in which the deductions were taken, all the operative facts giving rise to the obligation had occurred.

Harrold v. Commissioner, 192 F.2d (1002, 52-1 USTC ¶ 9107 (4th Cir. 1951)

Denise Coal Company v. Commissioner, 217 F.2d 930, 59-2 USTC ¶ 9769 (3d Cir. 1959).

10. A licensed gaming establishment is not precluded from deducting accrued but unpaid progressive slot machine jackpots until the actual payment of the gaming debt. The requirement for accruability is that there be a reasonable expectancy that the payment will be made.

Flamingo Resort, Inc. v. United States, 664 F.2d 1387 (9th Cir. 1982), *aff'g* 485 F. Supp. 926, 80-1 USTC ¶ 9312 (D. C. Nev. 1980)

Eastman Kodak Co. v. United States, 534 F.2d 252, 76-1 USTC ¶ 9363 (Ct. Cl. 1976)

Champion Spark Plug Co. v. Commissioner, 30 T. C. 295 (1958), *aff'd* 266 F.2d 347 (6th Cir. 1959)

Barker v. Magruder, 95 F.2d 122, 38-1 USTC ¶ 9052 (D. C. Cir. 1938)

Barker v. United States 26 F.Supp. 1004, 39-1 USTC ¶ 9437 (Ct. Cl. 1939)

Travis v. Commissioner, 406 F.2d 987, 69-1 USTC ¶ 9213 (6th Cir. 1969)

11. The liability for accrued but unpaid progressive slot machine jackpots is a fixed and definite, rather than contingent, liability because the licensed gaming establishment is precluded from avoiding payment by the Nevada Gaming Regulations, which are binding upon all licensed gaming establishments in Nevada.

Nevada Gaming Regulation § 5.110.

12. Even if the winning pull of the handle of the progressive slot machine were regarded as a contingency, the contingency is not the type which would preclude the deduction. A liability satisfies the all events test for Federal income tax purposes even though there exist contingencies relating to the liability if there is a reasonable certainty of payment and the amount of the liability is definitely ascertainable.

Washington Post Company v. United States, 405 F.2d 1279, 69-1 USTC ¶ 9192 (Ct. Cl. 1969)

Clark v. Woodward Construction Company, 179 F.2d 176, 50-1 USTC ¶ 9133 (10th Cir. 1950)

13. The accrued liability may be recognized for Federal income tax purposes if there exists, at the end of the taxable years at issue, a reasonable expectancy of payment of the amount.

Flamingo Resort Inc. v. United States, supra

United Control Corporation, 38 T. C. 957 (1962)

Harbor Plywood Corporation v. Commissioner, 187 F.2d 734, 51-1 USTC ¶ 9222 (9th Cir. 1951), *aff'g* 14 T. C. 158 (1950)

H. Liebes and Company v. Commissioner, 90 F.2d 932, 37-3 USTC ¶ 9361 (9th Cir. 1937)

Zwicker Knitting Mills v. United States, 80-2 USTC ¶ 9832 (Ct. Cl. 1980)

14. Although a reasonable expectancy of the payment of the liability is required, absolute certainty of its eventual payment is not required for the accrual of an expense for Federal income tax purposes by an accrual basis taxpayer.

Keebey's, Inc. v. Paschal, 188 F.2d 113, 51-1 USTC ¶ 9235 (8th Cir. 1951)

Zimmerman Steel Company v. Commissioner, 130 F.2d 1011, 42-2 USTC ¶ 9697 (8th Cir. 1942)

Clark v. Woodward Construction Company, supra

Washington Post Company v. United States, supra

Zwicker Knitting Mills v. United States, supra

15. A taxpayer can accrue an expense or obligation that is reasonably certain in fact even though the existence of the liability is not absolute until the occurrence of a condition in a year subsequent to the year of accrual.

Lucas v. American Code Co., 280 U.S. 445 (1930)
Gillis v. United States, 402 F.2d 501 (5th Cir. 1968)

16. An existing liability subject to possible discharge by a speculative or extremely remote future event or condition subsequent may be reasonably certain in fact and accrued if the accrual is practical in terms of the purpose of the statute and the taxpayer has a reasonable belief in the certainty of the liability.

Mooney Aircraft, Inc. v. United States, 420 F.2d 400 (5th Cir. 1969)

Helvering v. Russian Finance & Construction Corp., 77 F.2d 324 (2d Cir. 1935)

17. The test is whether the Plaintiff is justified in entertaining a reasonable expectation that the expense

will be paid. Even if the winning pull of the handle of the progressive slot machine were regarded as a contingency, such a contingency is not of the nature which would have justified the Plaintiff in believing at the time of the accrual that the obligation would not be paid in the normal course of events.

Helvering v. Russian Finance & Construction Corp., supra

18. The possibility that Plaintiff could go out of business is not the kind of possible contingency that aborts satisfaction of the all events test.

Lawyers Title Guaranty Fund v. United States, 508 F.2d (5th Cir. 1975)

19. The accrued progressive slot machine jackpots are deductible even though the time for payment of the accrued liability and the identity of the winning customer are uncertain.

Washington Post Company v. United States, supra

Inland Steel Company v. United States, 76-2 USTC ¶ 9791 (Ct. Cl. 1976)

Lukens Steel Co. v. Commissioner, 442 F.2d 1131, 71-1 USTC ¶ 9374 (3d Cir. 1971), *aff'g* 52 T. C. 764 (1969)

Cyclops Corporation v. United States, 408 F. Supp. 1287, 76-1 USTC ¶ 9179 (W. D. Pa. 1976)

Reynold Metals Co., 68 T. C. 943 (1977)

20. The accrued but unpaid progressive slot machine jackpots are deductible because a deductible liability can arise out of a state legal requirement rather than out of a contractual obligation.

Harrold v. Commissioner, supra

Denise Coal Company v. Commissioner, supra

Crescent Wharf & Warehouse Co. v. Commissioner, supra

21. The accrual of unpaid progressive slot machine jackpots as liabilities conforms with generally accepted accounting principles and results in a proper matching of revenues and expenses. Whenever possible, expenses attributable to the production of gross income should be deducted in the same year in which the income is produced. The proper matching of revenues and expenses is an important factor to be considered in determining the proper application of accrual principles.

Pacific Grape Products Co. v. Commissioner, 219 F.2d 862 (9th Cir. 1955), *rev'g* 17 T.C. 1097 (1952)

United States v. Anderson, 269 U.S. 522, 70 L. Ed. 347, 1 USTC ¶ 155 (1926)

Flamingo Resort, Inc. v. United States, supra

Travis v. Commissioner, supra

Crescent Wharf & Warehouse Co. v. Commissioner, supra

NCNB Corporation v. United States, 651 F.2d 942, 81-2 USTC ¶ 9501 (4th Cir. 1981)

22. The fact that the Plaintiff's deduction of accrued but unpaid progressive jackpots accords with generally accepted accounting principles is an important factor in determining whether such accrual is acceptable for Federal income tax purposes.

Code Section 446 and Reg. § 1.446-1(c)(1)(ii)

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

CROSS-MOTION OF HUGHES PROPERTIES, INC. FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Hughes Properties, Inc., pursuant to Rule 56 of the Rules of this Court, respectfully moves for summary judgment in its favor and requests that defendant's motion for summary judgment be denied. There is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

In support of this cross-motion and response, plaintiff relies on the Affidavits contained in the Appendix to the brief in support of this cross-motion and response and our accompanying brief.

WHEREFORE, plaintiff prays that its cross-motion be granted and that defendant's motion be denied.

Respectfully submitted,

/s/ Denton N. Thomas
DENTON N. THOMAS
Andrews & Kurth

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

APPENDIX TO THE BRIEF FOR HUGHES PROPERTIES, INC. IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

NEVADA GAMING STATUTES:

Nevada Revised Statutes § 463.310 (as in effect during the taxable years at issue)

§ 463.310 Investigations; disciplinary proceedings; powers of commission.

1. The board shall make appropriate investigations:

(a) To determine whether there has been any violation of this chapter, chapter 464 or chapter 465 of NRS or any regulations adopted thereunder.

(b) To determine any facts, conditions, practices or matters which it may deem necessary or proper to aid in the enforcement of any such law or rules and regulations.

(c) To aid in adopting regulations.

(d) To secure information as a basis for recommending legislation relating to this chapter, chapter 464 or chapter 465 of NRS.

(e) As directed by the commission.

2. If, after any investigation the board is satisfied that a license, registration, finding of suitability, pari-mutuel license or prior approval by the commission of any transaction for which such approval was required or permitted under the provisions of this chapter or chapter 464 of NRS should be limited, conditioned, suspended or revoked, it shall initiate a hearing before the commission by filing a complaint with the commission in accordance with NRS 463.312 and transmit therewith a summary of evidence in its possession bearing on the matter and the transcript of testimony at any investigative hearing conducted by or on behalf of the board.

3. Upon receipt of the complaint of the board, the commission shall review it and all matter presented in support thereof, and, if satisfied that probable grounds exist for disciplinary or other action, shall conduct further proceedings in accordance with NRS 463.312. If the commission is not satisfied that probable grounds exist for disciplinary or other action, it may order the complaint withdrawn without prejudice to the filing of another complaint after further investigation and reconsideration by the board.

4. After the provisions of subsections 1, 2 and 3 above have been complied with, the commission may:

(a) Limit, condition, suspend, or revoke the license of any licensed gaming establishment or the individual license of any licensee without affecting the license of the establishment;

(b) Limit, condition, suspend or revoke any registration, finding of suitability, pari-mutuel license, or prior approval given or granted to any applicant by the commission;

(c) Order a licensed gaming establishment to keep an individual licensee from the premises of such licensed gaming establishment or not to pay such licensee any remuneration for services or any profits, income or accruals on his investment in such licensed gaming establishment; and

(d) Fine the licensee, registrant, person or entity previously found suitable, pari-mutuel licensee, or person or entity who previously obtained approval for any act or transaction for which commission approval was required or permitted under the provisions of this chapter or chapter 464 of NRS, not more than $100,000 for the first violation and not more than $250,000 for each subsequent violation of the provisions of this chapter, chapter 464 or chapter 465 or NRS or of the regulations of the commission.

All fines shall be paid to the state treasurer for deposit in the general fund.

* * * * *

NEVADA GAMING REGULATIONS:

Reg. § 5.110 Progressive Slot Machines. (As adopted September 1972)

1. This paragraph shall apply to any slot machine with a payoff indicator which has a payoff that increases as the machine is played.

2. No payoff indicator shall be turned back to a lesser amount, unless the amount by which the indicator has been turned back is actually paid to a winning player, or unless the change in the indicator reading is necessitated through a machine malfunction, in which case an explanation must be entered on the daily report as required in subsection 5.

3. If the payoff indicator progresses without a payoff until the indicators return to zero, some means must be

utilized to add another digit, unless a dollar limit has been posted on the machine clearly visible to the player, and which was posted before any payoff was registered on the indicator. When the limit has been reached it must be permitted to remain until won by a player.

4. Once a payoff amount appears on an indicator, the rate of progression may not be changed until there has been a winner, and the indicator is returned to zero.

5. Records shall be maintained which record the amount of the indicated payoff at least once per day. Supporting documents shall be maintained to explain any reduction in the payoff amount from the previous entry. Such records and documents shall be retained for a period of three years unless permission to destroy them earlier is given by the board in writing.

Reg. § 5.110 Progressive Slot Machines. (As amended March 1 1977)

1. *Applicability.* This regulation shall apply to any slot machine with a payoff indicator which has a payoff that increases as the machine is played.

2. *Limits.* A licensee may impose a limit on the jackpot of a progressive slot machine so long as the limit imposed is greater than the possible maximum jackpot payout showing on the machine at the time the limit is imposed. Progressive slot machines upon which a limit has been imposed by the licensee must have a sign posted predominately [*sic*] upon it informing the public of the limit imposed.

3. *Cash requirements.* Licensees who operate under a restricted license or who are classified as a Group II nonrestricted licensee must maintain a minimum cash reserve equal to the total of all progressive slot machine jackpots which may be won at the location. Nonrestricted Group I gaming licensees shall at all times maintain sufficient cash or cash equivalents to provide payment of all progressive jackpots offered to the public as prizes.

4. *Payoff indicators.* No payoff indicator shall be turned back to a lesser amount unless one of the following circumstances occur:

(a) The amount shown on the progressive meter is paid to a player as a jackpot; or

(b) It becomes necessary to adjust the progressive meter to prevent the jackpot indicator from displaying an amount greater than the limit imposed by the licensee pursuant to paragraph 2 of this regulation; or

(c) It becomes necessary to change the jackpot indicator because of machine malfunction, in which case an explanation must be entered on the daily report as required by paragraph 6 of this regulation.

5. *Payoff required.* Once a payoff amount appears on a jackpot indicator, the progressive meter may not be decreased except as allowed by this regulation. A progressive jackpot may be transferred to another progressive machine at the same location in the event of machine malfunction, replacement, or for other good reason. When the maximum jackpot limit is reached, it must be permitted to remain until won by a player.

6. *Records.* Records shall be maintained which record the amount shown on each progressive jackpot meter at least one time daily. Supporting documents shall be maintained to explain any reduction in the payoff amount from the previous entry. Such records and documents shall be retained for a period of five years unless permission to destroy them earlier is given by the board in writing.

7. *Effective date.* This regulation shall become effective on March 1, 1977, and shall apply to all licensees affected thereby who are then or thereafter licensed.

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF PETER ECHEVERRIA IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Peter Echeverria, being duly sworn, deposes and says:

1. I have been licensed as an attorney at law in the State of Nevada since 1949. From April 27, 1973, through April 27, 1977, I served as a member of the Nevada Gaming Commission, and I served as Chairman of the Nevada Gaming Commission from October 1, 1973, through April 27, 1977. As a member of the State Bar of Nevada and as past Chairman of the Nevada Gaming Commission, I am familiar with the Nevada gaming laws and regulations and the policies of the Nevada Gaming Control Board and the Nevada Gaming Commission.

2. Under Nevada law as in effect from June 30, 1973, through June 30, 1977, the Nevada Gaming Control Board had the authority to enforce the regulations of the

Nevada Gaming Commission which regulated the activities of licensed gaming establishments in the State of Nevada. Included within the authority of the Nevada Gaming Control Board was the enforcement of Nevada Gaming Regulation § 5.110.5, as then in effect, relating to the use of progressive slot machines by licensed gaming establishments.

3. Section 463.310.4 of the Nevada Revised Statutes and Regulation 7 of the Nevada Gaming Regulations, as in effect from June 30, 1973, through June 30, 1977, permitted the Nevada Gaming Commission to impose severe sanctions, including fines and/or revocation or suspension of the gaming license, if a licensed gaming establishment wrongfully refused to pay a progressive slot machine jackpot which was won by a customer.

4. If a licensed gaming establishment proposed to discontinue the use of a progressive slot machine, the policy of the Nevada Gaming Control Board and the Nevada Gaming Commission as of June 30, 1973, through June 30, 1977, was to require the gaming establishment to either (a) continue the progressive slot machine in play until the progressive jackpot had been paid to a winning customer or (b) transfer the progressive jackpot amount to another progressive slot machine remaining in play at the licensed gaming establishment.

5. If a gaming establishment proposed a sale or other disposition of the entire gaming business, the policy of the Nevada Gaming Control Board and the Nevada Gaming Commission from June 30, 1973, through June 30, 1977, was to require the buyer to continue the progressive slot machines in play following the sale or other disposition with the same or greater progressive jackpot amounts as at the time of the sale until the jackpots were won by customers of the buyer. Whether or not the sales price for the gaming business was to be adjusted to reflect the assumption of the progressive slot machine liabilities was to be a subject of contractual negotiations between the buyer and seller. The policy of the Nevada Gaming Con-

trol Board and the Nevada Gaming Commission was not to approve the sale or other disposition unless adequate provisions were made for the payment of the progressive slot machine liabilities prior to the sale or the assumption of the liabilities by the buyer following the sale.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25th, 1983, in Reno, Nevada.

/s/ Peter Echeverria
PETER ECHEVERRIA

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF PHILIP D. GRIFFITH IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Philip D. Griffith, being duly sworn, deposes and says:

1. I am employed as the President of the Harolds Club division of Hughes Properties, Inc., a Nevada corporation doing business as Harolds Club.

2. As the President of the Harolds Club division, I am responsible for the compliance by Hughes Properties, Inc. with all of the Nevada gaming regulations affecting slot machines, including progressive slot machines. Nevada Gaming Regulation § 5.110.5 requires that the amount of the accrued but unpaid progressive slot machine jackpots be recorded at least once per day. At Hughes Properties, Inc., the amount of the accrued but unpaid progressive slot machine jackpots is recorded once during each of the three shifts during each day. The amount is

recorded on a progressive slot machine daily report. At the close of business on June 30, 1973, 1974, 1975, 1976, and 1977, the progressive slot machine daily report indicated that the total amount of the then accrued but unpaid progressive slot machine jackpots of Hughes Properties, Inc. was as follows:

Fiscal Year Ended June 30	Accrued Liability
1973	$360,228.55
1974	563,983.99
1975	853,584.22
1976	839,400.97
1977	888,820.67

The progressive slot machine daily reports for such shifts were, in my opinion, properly prepared by the employees of Hughes Properties, Inc., in the ordinary course of their employment. Accordingly, the total amount of the accrued but unpaid progressive slot machine jackpots indicated thereon was the accurate amount of the then accrued but unpaid progressive slot machine jackpots of Hughes Properties, Inc.

3. All of the accrued but unpaid progressive slot machine jackpots as of June 30, 1977 were subsequently won and paid to customers of the corporation. The average period of time between Harolds Club's payoffs on a progressive slot machine's guaranteed jackpot is approximately 4.5 months. This determination was made as of September 1, 1976, for the twenty-four (24) 4-reel progressive slot machines then in operation. All but two of these machines were installed prior to 1974. With the exception of two machines, one of which had been in operation thirteen (13) months and the other thirty-five (35) months that did not pay off prior to September 1, 1976, the payoff frequency ranged from a high of 14.3 months to a low of 1.9 months. As of September 1, 1976, Harolds Club also operated ninety-two (92) 3-reel progressive slot machines. The average number of "plays"

required for a payoff on these machines is significantly lower than that of the 4-reel machines.

4. Hughes Properties, Inc. has had a long history of success in the gaming business, and there was absolutely no expectation of the discontinuance by the corporation of its gaming business or the surrender of its gaming license during or following the taxable years in question. To the contrary, as evidenced by the magnitude of the investment in Harolds Club by Hughes Properties, Inc., the corporation intended to continue its gaming business for an indefinite period in the future.

5. Considering the financial condition of Hughes Properties, Inc. at the end of the taxable years at issue, the possibility of Hughes Properties, Inc. becoming bankrupt was also extremely remote and speculative.

6. In my opinion, during the entire taxable years ending June 30, 1973, 1974, 1975, 1976, and 1977, all of the requirements of Nevada Gaming Regulation § 5.110 pertaining to progressive slot machines were complied with by Hughes Properties, Inc. There were no instances in which a progressive slot machine was removed from the casino floor without the amount of the accrued but unpaid progressive jackpot being transferred to one or more of the remaining progressive slot machines, other than occasional instances when a progressive slot machine was briefly removed from the casino floor for routine repairs and maintenance. Whenever a progressive slot machine is removed from the casino floor for repairs and maintenance, if the amount of the accrued but unpaid progressive jackpot is not immediately transferred to one or more of the remaining progressive slot machines, then the machine is immediately returned to the casino floor following the completion of the repairs or maintenance with the same amount of accrued but unpaid jackpot as prior to the removal from the casino floor. Unless the repairs and maintenance can routinely be completed within one day from the time the machine is removed from the casino floor, the amount of the accrued but unpaid progressive

slot machine jackpot will be transferred to one or more of the remaining progressive slot machines at the time the machine is removed from the casino floor.

7. The rate of progression on the progressive slot machines in play at Hughes Properties, Inc. refers to the rate of increase in the amount of the accrued but unpaid progressive jackpot on each machine as such machine is played, depending on the particular machine. The rate of progression on each progressive slot machine is fixed at the time the machine is placed on the casino floor, and the rate of progression may not be subsequently changed until either the jackpot is won by a customer or the jackpot limit is reached.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1983, in Las Vegas, Nevada.

/s/ Philip D. Griffith
PHILIP D. GRIFFITH

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF PHILIP P. HANNIFIN IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Philip P. Hannifin, being duly sworn, deposes and says:

1. I am presently employed as Senior Vice President of Summa Corporation (4045 South Spencer Street, Las Vegas, Nevada 89109). As Senior Vice President of Summa Corporation, I am responsible for the compliance of Summa Corporation with all of the Nevada gaming regulations affecting slot machines, including progressive slot machines.

2. I was formerly Chairman of the Gaming Control Board of the State of Nevada. As such, I am familiar with the Nevada gaming laws and regulations and the policies of the Nevada Gaming Control Board and Nevada Gaming Commission.

3. The laws, regulations, and policies referred to in this affidavit were in effect from June 30, 1973, through

June 30, 1977, and have continued in effect to the present time.

4. Under Nevada law, the Nevada Gaming Control Board has the authority to enforce the regulations of the Nevada Gaming Commission which regulate the activities of licensed gaming establishments in the State of Nevada.

5. The Nevada Gaming Regulations are binding upon all licensed gaming establishments in the State of Nevada. Harolds Club is a licensed gaming establishment subject to the Nevada Gaming Regulations.

6. On July 1, 1972, there were no regulations pertaining to progressive slot machines. At that time, the amount accrued for each machine was not a fixed liability because the liability could be avoided by removing the machine from the casino.

7. Upon the adoption of Gaming Regulation § 5.110 in September of 1972, the liability for accrued but unpaid progressive slot machine jackpots became fixed. Regulation § 5.110 precludes a licensed gaming establishment from avoiding payment of accrued but unpaid progressive slot machine jackpots. Therefore, the liability for accrued but unpaid progressive slot machine jackpots is not subject to a contingency.

8. The winning pull of the handle of the progressive slot machine solely determines the time of the payment of the liability and the identity of the payee.

9. The amount of the accrued but unpaid progressive slot machine jackpot liability can be determined with reasonable accuracy by reading the payoff indicator on the machine. The payoff indicator states the exact amount of the accrued but unpaid progressive slot machine jackpot for that machine at that particular point in time.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1983, in Las Vegas, Nevada.

/s/ Philip P. Hannifin
PHILIP P. HANNIFIN

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF GENE HARRIS IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

Gene Harris, being duly sworn, deposes and says:

1. I am licensed by the Texas State Board of Public Accountancy as a certified public accountant. I am also a partner of the certified public accounting firm of Deloitte Haskins & Sells (formerly Haskins & Sells).

2. During the period of time that I have been a member of Deloitte Haskins & Sells, I have worked on the account of Hughes Properties, Inc. While working on the account of Hughes Properties, Inc., I assisted in the preparation of its financial statements for the fiscal years ending June 30, 1973, through June 30, 1977. As an independent certified public accountant assigned to the Hughes Properties, Inc. account I have become thoroughly familiar with the method of accounting for progressive

slot machine liabilities. Because of the fact that under the Nevada Gaming Regulations adopted in September 1972, a licensed gaming establishment may not decrease the amount of a progressive slot machine jackpot until the jackpot is won by a customer, the total amount of accrued but unpaid progressive slot machine jackpots is recorded on the financial records of the corporation as an accrued liability. As the amount of the accrued but unpaid progressive slot machine jackpot increases, the increase is recorded as a reduction of the slot machine gross profit or "win" (a debit to the "slot income" account) and as an increase in the liability account (a credit to the "progressive slot machine jackpots" account). When a progressive slot machine jackpot is won by a customer and the amount of the jackpot is paid, the liability account is reduced by the amount of the jackpot paid. The reduction is accomplished by a debit to the liability account. The corresponding credit is to the appropriate cash account. No additional reduction of the slot machine gross profit is recorded at the time the jackpot is paid.

3. The income earned with respect to each progressive slot machine is recorded when the coins deposited into the machine (the "drop") are counted. Such coins are collected from each machine and counted at least twice per week and on the last day of each calendar month. Because the amount of the liability for accrued but unpaid progressive slot machine jackpots increases in direct proportion to the volume of play on the machines, and because the income is recorded during the same period in which the play occurs and the related income is earned, the recordation of the increase in the accrued but unpaid progressive slot machine jackpots as a reduction of the slot machine gross profit in the same period results in a proper matching of revenues and expenses and clearly reflects income. Since the Nevada Gaming Regulation pertaining to progressive slot machines first became effective in September 1972, the first fiscal year of

Hughes Properties, Inc. for which the above-described accounting method was appropriate was the fiscal year ending June 30, 1973.

4. The financial statements and federal income tax return for Hughes Properties, Inc. for the fiscal year ending June 30, 1973, reported the accrued but unpaid progressive slot machine jackpots as liabilities. As of June 30, 1973, the certified public accounting firm of Haskins & Sells determined that, under generally accepted accounting principles, the accrued but unpaid progressive slot machine jackpots should be reported on the financial records of the corporation as accrued liabilities. Since that time, the accrued but unpaid progressive slot machine jackpots have been consistently reported on the financial records and federal income tax returns of the corporation as accrued liabilities. The amount of such liabilities were determined from the daily progressive slot machine reports listing the accrued but unpaid progressive slot machine jackpots as of the close of business on June 30, 1973, 1974, 1975, 1976 and 1977. The daily progressive slot machine report was prepared by employees of Hughes Properties, Inc. in the ordinary course of their employment.

5. In my opinion, the reporting of accrued but unpaid progressive slot machine jackpots as accrued liabilities and any increases in the accrued liabilities as a reduction of the slot machine gross profit conforms with generally accepted accounting principles.

6. Because all subsequent increases in the amount of the jackpot must result from play on the machines and the corresponding recognition of taxable income by the casino, there would be no distortion of income resulting from the deduction of the subsequent accrual. To require the deduction to be deferred until the actual year of payment, rather than the year in which the liability accrues, could result in a material distortion of the income of Hughes Properties, Inc. for the year of payment.

The amount of the related expense is minimal compared to the amount of income recognized.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25th, 1983, in Houston, Texas.

/s/ Gene Harris
GENE HARRIS

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF A. J. HICKS IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

A. J. Hicks, being duly sworn, deposes and says:

1. I am a partner in the law firm of McDonald, Carano, Wilson, Bergin, Frankovich & Hicks, 214 Ridge Street, Reno, Nevada 89505.

2. I was formerly Deputy Attorney General, Chief, Gaming Division, State of Nevada. As former Deputy Attorney General, I am familiar with the Nevada gaming laws. The law referred to in this affidavit was in effect from June 30, 1973, through June 30, 1977, and has continued in effect to the present time.

3. A customer of a licensed gaming establishment has administrative remedies available to compel a licensed gaming establishment to pay a gaming debt. Pursuant to § 463.310 of the Nevada Revised Statutes, as in effect

during the taxable year in issue, administrative remedies could be imposed against any licensed gaming establishment which wrongfully refused to pay a gaming debt, including a progressive slot machine jackpot, to a customer who had properly won the game, prize, or jackpot. The Nevada Gaming Commission may impose severe sanctions, including fines and/or the revocation or suspension of the gaming license.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1983, in Reno, Nevada.

/s/ A. J. Hicks
A. J. HICKS

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF JEFFREY A. SILVER IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Jeffrey A. Silver, being duly sworn, deposes and says:

1. I am presently Chief Operations Officer of the Landmark Hotel and Casino, 346 Convention Center Drive, Las Vegas, Nevada 89109.

2. I was formerly a member of the Nevada Gaming Control Board. As a former member of the Nevada Gaming Control Board, I am familiar with the Nevada gaming laws and regulations and the policies of the Nevada Gaming Control Board and the Nevada Gaming Commission.

3. The regulations and policies referred to in this affidavit were in effect from June 30, 1973, through June 30, 1977, and have continued in effect to the present time.

The Nevada Gaming Regulations are binding upon all licensed gaming establishments in the State of Nevada.

4. Under Nevada law, the Nevada Gaming Control Board has the authority to enforce the regulations of the Nevada Gaming Commission which regulates the activities of licensed gaming establishments in the State of Nevada. Included within the authority of the Nevada Gaming Control Board is the enforcement of Nevada Gaming Regulation § 5.110 relating to the use of progressive slot machines by licensed gaming establishments.

5. Accrued but unpaid progressive slot machine jackpots are fixed liabilities because Nevada Gaming Regulation § 5.110 precludes the licensed gaming establishment from avoiding payment of the jackpot.

6. The provisions of Nevada Gaming Commission Regulation § 5.110 have been applied by the Nevada Gaming Control Board as making guaranteed jackpots fixed liabilities of the licensee. Two instances of the Board's application of this fixed liability concept are as follows:

(a) A licensee requested permission to remove a progressive slot machine from operation and replace it with a regular slot machine. The Board granted approval upon the condition that the guaranteed jackpot of the removed progressive slot machine be added to the guaranteed jackpot amount of another progressive slot machine.

(b) A licensee who initially operated as a sole proprietorship but who had subsequently acquired a partner requested permission to remove all progressive slot machines from its casino floor. Even though a new individual had become a licensee and the form of casino ownership had changed to a partnership, the Board denied permission since the guaranteed progressive jackpot had not been paid.

7. Once a progressive slot machine is placed in operation, the liability for its guaranteed jackpot cannot be avoided by removing the machine, changing the form of

the licensee's business operations or by a change of licensees.

8. Sums shown on the meter, in contrast to standard slot machines, actually represent participation by the players, a portion of their play being used to increase the award. The Board in recognizing this investment requires the licensee to be responsible for the obligation shown on the meter, and holds its accountable until the amount is actually paid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1983, in Las Vegas, Nevada.

/s/ Jeffrey A. Silver
JEFFREY A. SILVER

IN THE UNITED STATES CLAIMS COURT

No. 594-82 T

HUGHES PROPERTIES, INC., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT OF JOHN H. STRATTON IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

John H. Stratton, being duly sworn, deposes and says:

1. From July 1, 1972 through June 30, 1977, I was a member of the Nevada Gaming Control Board. As a former member of the Nevada Gaming Control Board, I am familiar with the Nevada gaming laws and regulations and the policies of the Nevada Gaming Control Board and the Nevada Gaming Commission.

2. The laws, regulations, and policies referred to in this affidavit were in effect from June 30, 1973, through June 30, 1977, and have continued in effect to the present time.

3. Under Nevada law, the Nevada Gaming Control Board has the authority to enforce the regulations of the Nevada Gaming Commission which regulates the activities of licensed gaming establishments in the State of

Nevada. Included within the authority of the Nevada Gaming Control Board is the enforcement of Nevada Gaming Regulation § 5.110.5 relating to the use of progressive slot machines by licensed gaming establishments.

4. Section 463.310 of the Nevada Revised Statutes and Regulation 7 of the Nevada Gaming Regulations permit the Nevada Gaming Commission to impose severe sanctions, including fines and/or revocation or suspension of the gaming license, if a licensed gaming establishment wrongfully refuses to pay a progressive slot machine jackpot which is won by a customer. The procedures to be followed by and the remedies available to the Nevada Gaming Control Board and the Nevada Gaming Commission upon receipt of a complaint from a customer of the alleged non-payment of a progressive slot machine jackpot are outlined below. Upon receiving a complaint from the customer of a gaming establishment, the Gaming Control Board will schedule a formal hearing and commence its investigation of the complaint. Upon completion of the investigation and the hearing, the Gaming Control Board will determine whether the gaming establishment should or should not have paid the progressive slot machine jackpot. If the Gaming Control Board determines that the gaming establishment justifiably refused to pay the progressive jackpot because of cheating by the customer or other valid reasons, the Gaming Control Board will dismiss the customer's complaint and no further action will be taken. If, however, the Gaming Control Board determines that the progressive jackpot was validly won by the customer and should have been paid and the licensee still refuses to make payment, the Gaming Control Board will either file an order to show cause against the gaming establishment or immediately file a complaint with the Nevada Gaming Commission requesting the imposition of sanctions against the licensed gaming establishment. The sanctions which the Nevada Gaming Commission is authorized to impose against the licensed gaming establishment include severe fines and/or suspension or revocation of the gaming license.

5. If a licensed gaming establishment proposes to discontinue the use of a progressive slot machine, the policy of the Nevada Gaming Control Board is to require the gaming establishment to either (a) continue the progressive slot machine in play until the progressive jackpot has been paid to a winning customer or (b) transfer the progressive jackpot amount to another progressive slot machine remaining in play at the licensed gaming establishment. If the licensed gaming establishment does not comply with these requirements, the procedures and sanctions described in paragraph 4 above are available to the Nevada Gaming Control Board and the Nevada Gaming Commission.

6. If a gaming establishment proposes a sale or other disposition of its entire gaming business, the policy of the Nevada Gaming Control Board and the Nevada Gaming Commission is to require the buyer to continue the progressive slot machines in play following the sale or other disposition with the same or greater progressive jackpot amounts as at the time of the sale until the jackpots are won by customers of the buyer. Whether or not the sale price for the gaming business is to be adjusted to reflect the assumption of the progressive slot machine liabilities is a subject of contractual negotiations between the buyer and seller. The policy of the Nevada Gaming Control Board and the Nevada Gaming Commission is to not approve the sale or other disposition unless adequate provisions are made for the payment of the progressive slot machine liabilities prior to the sale or the assumption of the liabilities by the buyer following the sale. Failure to comply with these requirements will result in the imposition of sanctions against the non-complying party.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1983, in Reno, Nevada.

/s/ John H. Stratton
JOHN H. STRATTON

SUPREME COURT OF THE UNITED STATES

No. 85-554

UNITED STATES, PETITIONER

v.

HUGHES PROPERTIES, INC.

ORDER ALLOWING CERTIORARI

Filed December 2, 1985

The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted.

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